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Supreme Court of the United States

October Term, 1943

No. 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF FOR RESPONDENT.

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October, 1943.

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NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The findings of fact and conclusions of law of the District Court (R. 10-16) are not officially reported. The opinion of the Supreme Court of Minnesota (R. 17-39) is reported in 213 Minn. 395; 7 N. W. (2nd) 691.

JURISDICTION.

The judgment of the Supreme Court of Minnesota was entered December 31, 1942 (R. 39). The petition for writ of Certiorari was filed April 3, 1943, and granted May 10, 1943. Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (R. 18-39) violates the due process and commerce clauses of the United States Constitution and that the decision is in conflict with the holdings of this court.

QUESTION PRESENTED.

Whether a non-discriminatory personal property tax laid by the State of Minnesota on the fleet of airplanes operated by the petitioner, a Minnesota corporation, in interstate and foreign commerce to and from Minnesota violates Article 14, Section 1, and Article 1, Section 8, of the Constitution of the United States.

STATUTES INVOLVED.

The statutes under which the tax in question was levied are Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974) and reads as follows:

> "All real and personal property in this State, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation."

Minnesota Statutes 1941, Section 273.01 (Mason's Minnesota Statutes 1927, Section 1984):

> "* * * personal property shall be listed and assessed annually with reference to its value on May 1 * * *".

and Minn. Statutes 1941, Sec. 273.02 (Mason's Minnesota Statutes 1927, Section 1985):

> "If any * * * personal property be omitted in the assessment of any year or years, and the property thereby escape taxation, when such omission is discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted; and he shall assess the property, and extend against the same on the tax list for the current year all arrearages of taxes properly accruing against it * * *".

STATEMENT OF THE CASE.

For the convenience of the Court, a statement of the case is herein set forth. The petitioner is engaged in the business of carrying persons, property and mail in interstate and foreign commerce by airplane on regular schedules between Chicago, Illinois and Portland, Oregon, and Seattle, Washington, and to Winnipeg, Manitoba, Canada, via certain cities in Wisconsin, Minnesota; North Dakota, Montana and Washington. It also operated regular scheduled flights from Minneapolis, Minnesota, to Chicago, Illinois, without intervening stops (R. 10-11, ff. 20-21). The petitioner is a Minnesota corporation with its principal place of business at the St. Paul Municipal Airport, St. Paul, Ramsey County, Minnesota (R. 10, f. 20), where it maintained its airplane and engine overhaul base at which prin-

cipal repairs to its engines and planes were made (R. 11, f. 21); and all of its planes were registered with the United States Civil Aeronautics Authority with St. Paul as their home port (R. 13, f. 25). All of petitioner's planes were in Minnesota from time to time during the year 1939 enroute carrying passengers, property and mail and for periodical overhauling. On May 1, 1939, the assessment date, 15 of petitioner's planes were in Minnesota (R. pp. 12-13, ff. 24-25). At some stops along its route, petitioner had maintenance bases where minor repairs were made; also certain employees such as radio operator, station manager, ticket seller, etc., and at all stops it owns or leases space for office and hangars (R. 11, f. 22). Petitioner's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and were made pursuant to a certificate of public convenience and necessity (R. 13, f. 25). The Civil Aeronautics Authority maintained at regular intervals along petitioner's route radio range courses and emergency landing fields. But the regular course was abandoned whenever weather conditions required it (R. 12, f. 23). Total length of petitioner's route was 2,466 miles; in Minnesota, 320.2 miles or 14%; the total plane mileage on May 1, 1939, the assessment date, was 14,414 miles; in Minnesota, 2,348.4 miles or 16% (R. pp. 14-15, ff. 27-28). Petitioner's planes were constantly changing from place to place along the route. They were continuously engaged in flying from state to state except for brief stops at airports and except for occasional layups for repairs (R. p. 12, f. 24). Petitioner paid personal property taxes on some part of its fleet in Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington in 1939 (R. p. 14, f. 27).

For the year 1939, petitioner filed a personal property tax return and included therein planes of the true and full value of $77,000. Thereafter an additional assessment of omitted property, consisting of the remainder of petitioner's planes as of May 1, 1939, of the true and full value of $511,500 was made, resulting in a tax in the sum of $16,913.60. Upon failure to pay this tax, it was included in the delinquent tax list to which petitioner interposed an answer (R. pp. 13-14, ff. 26-27). Findings and Judgment for the respondent (R. pp. 15-16) were affirmed by the Supreme Court (R. pp. 17-39).

ARGUMENT.

SUMMARY OF ARGUMENT.

The Minnesota Supreme Court sustained a non-discriminatory ad valorem personal property tax upon the petitioner's fleet of planes, instrumentalities of interstate and foreign commerce, upon the ground that the owner is domiciled in Minnesota which has jurisdiction of the property. The tax does not violate the due process clause of the Federal Constitution because these planes are in Minnesota as much if not more than in other states and receive benefits of and protection from the laws of that state.

The petitioner has failed to sustain the burden of proving the tax illegal. It does not appear that any other state has acquired the *right* to tax any of these planes. They are in constant flight from state to state stopping only temporarily in some of them to take on or discharge passengers or cargo. The contention that the rolling stock

cases apply fails because it is not shown and cannot be shown that such an average number of the planes were so constantly present in any state beyond the domicile as to acquire a situs therein. Petitioner concedes that "Domicile of the owner determines the situs of such property only when physical situs elsewhere does not appear". (Petitioner's Brief, p. 8).

Nor is there any basis for the claim that there is precedent in the rolling stock cases for the principle that a domiciliary state is limited in its jurisdiction to tax a proportion because of the use of the property in other states. These cases permit a foreign state to tax according to their full value, the average number of items of rolling stock constantly within its borders, irrespective of the rights of other states. There is no requirement to apportion. It is impractical to apply the principle of the rolling stock cases to airplanes because of their tremendous speed which makes it possible to operate regular scheduled transcontinental passenger and cargo service with very few ships. In 1939 all the domestic air carriers in the United States had in service and reserve only 265 planes. So that if it could be applied, the same planes would have a situs for taxation in many states. Further different rules would be required for the taxation of planes engaged in non-stop flights passing over many states in which they do not land—and for planes engaged in trans-oceanic and foreign service.

The tax does not violate the commerce clause because it has long been held that a non-discriminatory tax upon the instruments of interstate commerce by a state having jurisdiction is permissible.

An alternative, sound in principle and tried and proven by long usage, is to be found in the cases holding ships, whether employed in foreign or interstate commerce,—on casual or regular scheduled service, in the coastwise trade or upon the inland waters, taxable only at the domicile of the owner because their stops at ports are temporary and without any purpose of abiding there. This rule could apply to all forms of interstate and foreign commercial aviation. The decision below was not founded upon those cases but might well have been.

I.

The Decision of the Court Below Is In Accord With and Is Sustained By the Decisions of This Court.

The basis of the court's decision as expressed by it, is as follows:

> "The power of this court over (petitioner) and the property taxed was present. (Petitioner) was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon (petitioner) by the government and laws of this state in relation to all (petitioner's) planes is equally clear. The policies and decisions made by (petitioner) in connection with the operation of its planes were made here and under the protection and benefits of the laws of this state. The manner and extent of their operation was determined and directed in this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes

> crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.
>
> There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over (petitioner) and its planes and the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax herein questioned on all the planes was a valid one." (R. 28-29, ff. 46-47).

And the court might have added to the foregoing that the planes were flown to and from Minnesota enroute (R. 5-6, ff. 10-11); that St. Paul, Minnesota, was the home port for the entire fleet (R. 7-8, ff. 14-15); and 15 planes, practically, all of said fleet was in Minnesota on May 1, 1939, the assessment date (R. 8, f. 15). The decision is consistent with *State Tax Commission v. Aldrich,* 316 U. S. 174, 86 L. Ed. 1358; and *Curry v. McCanless,* 307 U. S. 357, 83 L. Ed. 1339. It was on this basis that the court declared that the tax did not offend the Fourteenth Amendment.

The petitioner contends that the Aldrich and McCanless cases are not applicable because involved therein was a tax upon intangibles. These cases did not turn upon the nature of the property involved, whether tangible or intangible, *but upon the relationship of the state to the person or property taxed; upon the benefits conferred and the protection afforded by the laws of the taxing state.* So in the instant case, protection and benefits of inestimable value flow from the State of Minnesota and its laws to the petitioner and the property taxed. Nor does the fact that other

states may have afforded protection to the same planes alter the case. Jurisdiction in Minnesota to tax need be founded only upon the protection and benefits afforded by its laws. Taxation by a non-domiciliary state, however, cannot be supported by a showing only of some protection to the property—but must also be supported by situs therein. *Frick v. Penn.*, 268 U. S. 473, 69 L. Ed. 1058, and *Delaware L. & W. R. R. Co. v. Penn.*, 198 U. S. 341, 49 L. Ed. 1077, have not been overruled nor are they inconsistent with the decision here for review. Both cases were concerned with tangible personal property *permanently* located outside the state of the owner's domicile. In the Frick case it was an art collection permanently located in a foreign state; in the Delaware case the property consisted of coal collected in piles and held in a foreign state for sale. The tax by the domiciliary state was held to violate the Fourteenth Amendment because the property was under the *exclusive* jurisdiction of another state and did not receive any protection or benefits from the laws of the domiciliary state. *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, is likewise distinguishable. There the entire fleet of refrigerated cars was sought to be taxed by Kentucky, the state of domicile. Although the evidence established that the headquarters for all of its cars was located at Milwaukee, Wisconsin, the Kentucky Court of Appeals sustained the tax on the fleet. The court declared the question before it to be (199 U. S. 201) "whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property *permanently* located in other states, and employed there in the prosecution of its business." The court further declared (p. 206)

that the property in question "is taxable in the state where it is *permanently* located and employed and where it receives its *entire* protection." (Italics supplied.) "The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicil of the owner would be a denial of due process of law and beyond the power of the state. * * * That judgment did not deny to the state of the domicil of the owner power to tax tangibles which had not acquired an actual situs elsewhere." *Southern Pacific Company v. Kentucky,* 222 U. S. 63, 74; 56 L. Ed. 96. It therefore follows that the decision in this case turned upon the proposition that Kentucky was without jurisdiction to tax because the property involved was permanently located in a foreign state. We submit that these cases are inapplicable because it clearly appears in the case at bar that the property involved was constantly receiving the protection of and valuable benefits from the laws of the State of Minnesota.

It has not been decided that the right of the domiciliary state to tax property located within its borders and which receives the benefit and protection of its laws—is affected by the right of non-domiciliary state to tax the same property.

All of the rolling stock cases with the exception of *Union Refrigerator Transit Co. v. Kentucky, supra,* and *N. Y. C. & H. R. R. v. Miller,* 202 U. S. 584,; 50 L. Ed. 1155, were non-domiciliary cases. In none of them were the rights of the domiciliary state determined. In Union Refrigerator Transit Co. v. Kentucky, it was decided only that when the property is permanently located beyond the state, it cannot be taxed by the domiciliary state. And in the later

case, *N. Y. C. & H. R. R. v. Miller, supra,* the court said concerning this question (p. 598): "Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home," indicating that the court then considered it an open question. The state's taxing power over a corporation of its own creation was confirmed in *Newark Fire Ins. Co. v. State Board of Tax Appeals,* 307 U. S. 313; 83 L. Ed. 1312.

In the absence of any decision concerning the right to tax airplanes engaged in interstate and foreign commerce, and particularly in the absence of any decision concerning the right of a non-domiciliary state to tax such planes, the petitioner seeks to restrict and limit the power of the domiciliary state before there has been a determination of principles defining the non-domiciliary state's power to tax. Whenever a domiciliary state was denied the right to tax tangibles, it was for the reason that such state was unable to afford the benefit and protection of its laws enabling the owner to enjoy the fruits of his ownership and for the further reason that it lacked the power to reach effectively the interests protected for the purpose of subjecting them to payment of the tax. *Curry v. McCanless, supra.* But in the instant case, none of these objections are present. The petitioner not only exists by virtue of the laws of Minnesota, but it uses its property therein under the protection of the laws of that state.

II.

The Petitioner Failed To Sustain Its Burden of Proving That Any Other State Had Jurisdiction To Tax Any of the Property Involved In This Proceedings.

Even if it be assumed for the sake of argument that the reasons given in support of the decision of the court below are wrong and if it be conceded that jurisdiction to tax in a foreign state correspondingly restricts the jurisdiction of the domiciliary state, yet, in order that the petitioner may escape the tax in question, it had the burden of proving that the property in question had acquired a situs for taxation in some other state. *State v. Backus-Brooks Co.*, 102 Minn. 50, 112 N. W. 863; *Appeal of Meyer*, 158 Minn. 433, 436, 197 N. W. 970; *Newark Fire Ins. Co. v. State Board of Tax Appeals, supra.* This, it has failed to do.

Tangible personal property is taxable at the domicile of the owner; (*Johnson Oil & Refining Company v. Oklahoma*, 290 U. S. 158, 78 L. Ed. 238; *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 56 L. Ed. 96; *N. Y. C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 50 L. Ed. 1155). If it is permanently located within the borders of another state, it acquires a situs for taxation there. *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299, 49 L. Ed. 1059. In the instant case the property in question was not permanently located within the borders of any other state. It appears from the Stipulation and Findings of Fact that these planes were constantly in flight from state to state (R. 7, f. 14); (R. 12, f. 24), stopping only to take on or discharge passengers; and were in Minnesota enroute (R. 12-13, ff. 24-25), and for overhauling (R. 6, f. 11),

or for major repairs, this being the hom eport (R. 13, f. 25). Thus they were probably in Minnesota more frequently and for a greater period of time than elsewhere. None of the cases hold that the domiciliary state could not tax all the tangible personal property that had no situs elsewhere.

In order to oust Minnesota of jurisdiction to tax the Petitioner cited the rolling stock cases, so-called, and it was to these cases that the Court referred when it said, "Neither the stipulation nor the Findings of Fact are so clear as one could wish on whether such an average number of planes was so constantly and permanently in anyone state (other than state of domicile) as to acquire a situs there" (R. 23, f. 40). The rolling stock cases hold that when one permanently employs within the borders of a foreign state numerous items of tangible personal property, some or all of which are constantly changing, the average number permanently located therein may be subjected to taxation. But the average number over which the state acquires jurisdiction, *must be constantly and permanently and at all times present within the state.* Thus the rule as hereinbefore stated, was sufficiently relaxed to eliminate the necessity of each particular item of tangible personal property to be permanently located in a foreign state before that state could aequire jurisdiction. Jurisdiction attached to the average number constantly and permanently located with the borders of the state. *Pullman-Palace Car Co. vs. Penn.,* 141 U. S. 18, 35 L. Ed. 613; *American Refrigerator Transit Co. vs. Hall,* 174 U. S. 70, 43 L. Ed. 899; *Union Refrigerator Transit Co. vs. Lynch,* 177 U. S. 149, 44 L. Ed. 708; *Union Tank Line Co. vs. Wright,*

249 U. S. 275; *Johnson Oil Refining Co. vs. Oklahoma, supra.* In the *Pullman-Palace Car Co.* case, supra, it was found that there were an average of 100 cars *at all times within the state;* in *American Refrigerator Transit Co. vs. Hall, supra,* it was found there was an average of 40 cars; in the *Lynch case,* it was 10 cars; in the *Wright case,* it was 57 cars; and in the *Johnson Oil Refining case, supra,* it was found that the average number of cars was 64.

In essence the rule, as stated in the *Pullman Palace Car Co.* case, is (P. 26):

> "* * * particular cars may not remain within the state; *but the company has at all times substantially the same number of cars within the state,* and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state." (Italics supplied.)

The cases holding steamships engaged in interstate commerce taxable only at the owner's domicile were distinguished. They were said *not* to have a situs in other states (P. 23) "because they are not, in any proper sense, abiding within its limits, *and have no continuous presence* or actual situs within its jurisdiction and therefore can be taxed only at their legal situs, their home port and the domicile of their owners." (Italics supplied.) The distinguishing factor in the case of Pullman cars was *their continuous presence in the state.* It was on this point that the dissenting Justices disagreed with the majority. They declared that it was not a basis for jurisdiction to tax; that the case did not differ from the steamship cases.

There is no finding in the case at bar that there was an average number of these planes in any of the states in which the petitioner operates. How many of petitioner's planes were employed on the Minneapolis to Chicago run; how many on the Minneapolis to Winnipeg run; how many on the run from Minneapolis to Seattle and Portland does not appear. The only finding there is, is that these planes were constantly in flight from state to state, stopping only to discharge and take on passengers or for minor repairs (R. 12, f. 24). The route was through Minnesota, so that planes flew into and out of Minnesota and were here as much as they were in any other state, if not for even a greater length of time (R. 12, f. 24). When the planes were not in flight they returned to St. Paul, Minnesota, which is the home port of the planes; or were laid up there for major repairs which had to be done periodically (R. 11, f. 21; R. 13, f. 25). We submit that it is clear from these facts that there could be no finding that any of these planes were so permanently within the jurisdiction of any state other than the state of domicile so as to acquire a situs therein for taxation.

The petitioner contends that the Supreme Court of Minnesota found that some of the petitioner's planes acquired a situs in other states and to that extent were taxable in such states. But that contention is founded upon a misunderstanding of the Court's statement. The Court, after making the statement hereinbefore quoted, said, "But we shall not pursue the question, *for under the view we adopt it is not a material factor.* We concede * * * that the findings lead to the conclusion that some proportion of petitioner's planes acquired a situs in other states and to that extent may be taxed there" (R. 23, f. 40). (Italics sup-

plied.) It is clear from this statement that the court below, because of the conclusion which it had reached, decided that it was immaterial whether this property was taxable elsewhere or not, and therefore for the sake of the case and for the sake of argument made the concession mentioned. Since the Court was unable to discover from the findings that "such an average number of planes was so constantly and permanently in any one state as to acquire a situs there", it could have disposed of the case upon that ground alone, had it not determined to decide the case upon other grounds. In *N. Y. C. & H. R. R. Co. vs. Miller, supra,* in which the domiciliary state laid a tax upon all the cars of the railroad, a portion of which were alleged to have operated in other states, the court disposed of the case by saying (P. 598), "In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there." It is evident that such proof is lacking here and that the petitioner has failed to bring himself within the doctrine of the rolling stock cases and therefore the property in question was taxable in Minnesota.

III.

The Petitioner's Assumption That the Rolling Stock Cases Or Any Other Authority Supports Proportionate Taxation Is Erroneous.

It appears to be the contention of the Petitioner that when specific items of tangible personal property, instrumentalities of interstate commerce, are employed in several states that the right to tax extends only to a proportion

of any item or items so used. To put it another way it seems to be the claim of the petitioner that the several states must tax a proportion of these items based upon some formula such as route mileage or plane mileage as a basis for arriving at the proportion of the entire value of the fleet which each state may tax. In support of this new and radical theory the petitioner points to a general statement found in *Johnson Oil Refining Co. vs. Oklahoma, supra* (p. 162): "When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each state—it cannot be said that any one of the states is entitled to tax the entire number of cars regardless of their use in other states. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this court has held that a state may fix the tax by reference to the average number of cars found to be habitually within its limits." The petitioner also cites as an illustration of the rule of apportionment which must be applied in such cases, the statement found in *Union Refrigerator Transit Co. vs. Kentucky, supra,* referring to the decision in *Pullman's Palace Car Co. vs. Penn., supra* (p. 206): "We have also held that, if a corporation be engaged in running railroad cars into, through, and out of a state, and having at all times a large number of cars within the state, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run."

It can be clearly demonstrated that the petitioner's conclusion is unfounded. The rule of the rolling stock cases is that when *at all times* a large number of cars or other items of rolling stock are found within a foreign state, jurisdiction to tax the average number present at all times results. When such items of tangible personal property are used and employed as part of an operating system and have an added intangible value as a result thereof, the state need not confine itself in evaluating the personal property to the mere worth of the article considered separately but may include as well the intangible value due to what has been called the organic relation of the property in the state to the whole system. *Union Tank Line Co. vs. Wright, supra* (p. 282 and 283).

In this case it appeared that the Tank Line Co. had employed during the year in question an average of 57 cars which had an actual value of $47,000. Georgia, using a mileage formula for the purpose of determining the intrinsic value of the cars obtained a value of approximately $290,000. The court held that the method employed for the purpose of determining the value of the property need not be exact but it must produce results approximately correct. It found that the value obtained was arbitrary and excessive and therefore it violated the 14th Amendment as well as the Commerce clause. *The Pullman Palace Car Co. case, supra,* had been cited in support of the formula adopted by Georgia. The court pointed out that in the Pullman case a similar formula was resorted to to obtain the value of 100 cars found to be employed at all times within the state of Pennsylvania, but the formula there used did not appear to have produced an excessive or arbitrary value. The com-

pany did not make an issue of the formula used. The court therefore concluded (pg. 284): "But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable, and productive of conclusive results, it must be regarded as obiter dictum, and we cannot now approve or follow it"; and further stated (pg. 286): "In such circumstances reasonableness of the rule was not really in question, and what was said of it cannot control here where the very point is presented for decision." It therefore follows that what was said by the court in *Union Refrigerator Transit Co. vs. Kentucky, supra,* concerning the *Pullman Palace Car Co. case, supra,* insofar as it sanctions proportional taxation, was wrong and was expressly ruled out in the Wright case. Nor is there anything in the *Johnson Oil Co. v. Oklahoma case, supra,* that sanctions proportional taxation. This is borne out by the fact that regardless of what the court may have said in preliminary general statements in the case, it determined only that since the average number of cars at all times in the State of Oklahoma during the tax period was 64, the state's jurisdiction to tax extended only to that number. The court did not concern itself with the extent of the jurisdiction of other states to tax, but merely with the extent of the jurisdiction of Oklahoma. In that case it appeared that an Illinois corporation having its principal offices in the City of Chicago, operated a refinery in Oklahoma and maintained in connection therewith a fleet of tank cars, 380 in number, which, except for rare instances, were employed in Oklahoma and other foreign states. The average number of

cars found to be constantly present in Oklahoma during the tax period was 64. It was held that that state could tax such a number of cars which on the average were found to be physically present within the state.

In the case at bar, the planes were assessed according to their value as separate items and not as part of an operating system (R. pp. 13-14, ff. 26-27).

It follows from the cases herein referred to that if rolling stock have been so employed in any state beyond the domiciliary state so that an average number of them have acquired a situs for taxation therein that state may tax such stock *according to their full value including their intrinsic worth as part of an operating system* regardless of what the rights of other states along the route may be. There is no basis for contending that one state must share proportionately with other states along the route its right to tax appellant's planes if such right exists at all. If the petitioner's contention were sound, the extent to which one state could tax would depend entirely upon the length *of the petitioner's route. If it operated* in only two states it would appear that the right of each state would be much greater than if its route extended through 4 or 5 or more states, the number of planes being the same. Under the rule as announced by the cases cited, the right of each state to tax must turn upon the facts as they exist in each state. The right of each state to tax must turn upon the average number of items of personal property constantly employed in that state. The claim that the state must apportion is as we have seen without foundation.

IV.

The Rolling Stock Cases Are Inapplicable In the Taxation of Airplanes Engaged In Interstate and Foreign Commerce.

Aviation, like the railroad, has revolutionized travel. As the rules relating to the taxation of personal property were impractical in their application to the taxation of railroad rolling stock, so the rules applying to the taxation of rolling stock are impractical in their application to the taxation of airplanes. The extension of the railroad into interstate commerce by the absorption of and combination with other roads, brought into foreign states large amounts of rolling stock some or all of the items of which were constantly changing. Nevertheless there was at all times within such foreign states an average number of such items of rolling stock: It was at once evident that the application of the rules applying to the taxation of other tangible personal property would be impracticable and difficult to apply to rolling stock. Each item of personal property would be taxable or not depending upon the facts concerning that particular item; the difficulties that would result are apparent. The rule therefore was modified to give each state jurisdiction over the average number of items of rolling stock constantly within its borders. *Pullman Palace Car Co. v. Pennsylvania, supra.* The rule there announced has remained unchanged, down to *Johnson Oil Co. vs. Oklahoma, supra.*

The airplane has not only revolutionized travel but has changed our thinking about travel. Now we think of distance in terms of hours and minutes instead of miles. We

no longer think of Los Angeles as being so many hundreds of miles from New York—but as 12 hours distant; nor of London as over 3,000 miles from Washington—but as 15 hours distant. It was stated in the minority opinion of the court below (R. 32, f. 51): "Airplanes span the continent in a few hours, passing over many jurisdictions in the course of a day's flight." Hence the speed of the plane is such, that relatively few planes are necessary to operate regular scheduled service on an established route over many states each day. In 1939 there were only 265 transport planes in service and reserve by all domestic air carriers of the United States and 74 planes on foreign and territorial routes. *Civil Aeronautics Journal* (issued by Civil Aeronautics Authority) Vol. 1, No. 20, October 15, 1940, page 454.

Since a single plane is able to travel the entire route over many states each day, the rule applicable to rolling stock, is inapplicable to aviation. The flight of a plane into a foreign state stopping there solely for the purpose of taking on or discharging passengers or cargo or for minor repairs, does not give it a situs for taxation in that state or the same plane may be taxed in many states. Then there is the problem involving the states over which a plane may pass, as is its federal right to do, without stopping therein at all, as is the case here insofar as Idaho is concerned; and likewise insofar as Wisconsin is concerned—the petitioner conducts through flights from Minneapolis, Minnesota, to Chicago, Illinois (R. 10-11, ff. 20-21). Even if as many as 5 planes were to pass over each of the eight states on petitioner's route daily, for the greater part of each day none will be present in such states. How then will the average number of planes in each state be determined?

The fact is that none will be constantly present in any state. It has been herein shown that each state may tax the entire value of such items of personal property having a situs therein; that there is no basis for requiring any state to share or to apportion the tax upon such items of personal property with other states. This illustrates how different is the problem of the taxation of airplanes from that of the taxation of rolling stock of railroads. The thousands upon thousands of slow moving cars, freights, locals, nearly all engaged in intrastate as well as interstate commerce, do not present a difficult problem for taxation under the rule of the rolling stock cases. But it seems to us clear that such a rule cannot be practically applied to aviation. If it were applied to planes operating from state to state in interstate commerce, then how could it be applied to planes operating on non-stop cross-country flights, such as for example a non-stop flight from New York to Chicago, or from New York to Los Angeles. The right to use the air of intervening states in which the plane does not stop was granted by Congress. Upon what basis could such intervening states acquire jurisdiction to tax? There are no benefits or protection that flow from the laws of such states to the owner in the use and enjoyment of his property. Nor can such property be reached by such states for the enforcement of the tax. In the rolling stock cases the basis of jurisdiction *is the permanent and constant presence within the state of the average number of items.* Is the mere fleeting use of the air sufficient to give such state jurisdiction? If so, then each such state may tax the same plane on its full value, which is not the goal sought by the petitioner. Upon

what basis could American planes operating in trans-oceanic and foreign service be taxed? Surely these must be taxed either by the domiciliary state, or where the principal office, from which operations are directed, is located, if the owner be domiciled elsewhere. In the instant case both are in Minnesota (R. 10, f. 20). It would appear that if the rule of the rolling stock cases is to be applied to airplanes operating in interstate commerce from state to state, then a second rule must be adopted for non-stop flights and a third rule for planes operating in trans-oceanic or foreign service. Complications arise when the same planes are used both in domestic and foreign service. In the instant case, petitioner's planes fly to Winnipeg, Canada. Minnesota's right to tax them cannot be denied.

V.

The Tax Upon Petitioner's Fleet of Planes By the Domiciliary State Is Supported By the Decisions of This Court and It Is In the Best Interests of the Aviation Industry that Such Taxes Be Sustained.

It has long been the established rule of this court that instrumentalities of inter-state and foreign commerce that are brought into other states temporarily for the purpose of taking on or discharging passengers or cargo whether the stops in such states be regular scheduled stops or casual, such instrumentalities are taxable only at the domicile of the owner. The reason for the rule is that such instrumentalities are brought to such foreign states for temporary purposes, for purposes incidental to the journey, and without any intention that they should permanently

abide therein. *N. Y. C. & H. R. R. Co. v. Miller, supra; State v. Union Tank Line Company*, 94 Minn. 320, 102 N. W. 721. The doctrine is equally applicable to such instrumentalities whether engaged in foreign commerce or among the several states. *Hays v. Pacific Mail S. S. Co.*, 58 U. S. (17 How.) 596, 15 L. Ed. 254; *Morgan v. Parham*, 83 U. S. (16 Wall.) 471, 21 L. Ed. 303; *St. Louis v. Wiggins Ferry*, 78 U. S. (11 Wall.), 423, 20 L. Ed. 192; *Ayer & Lord Tie Company v. Kentucky*, 202 U. S. 409, 50 L. Ed. 1082; *Southern Pacific Company v. Kentucky, supra.* While this is not the ground upon which the court below based its decision it could well have been founded upon these cases and is adequately supported by them.

While these cases deal with the taxation of ships, they merely give expression to the well established rule governing the taxation of personal property. In *Hays v. Pacific Co., supra,* the ships operated on regular scheduled service between New York and San Francisco, via Panama. In *St. Louis v. Wiggins Ferry, supra,* a regular scheduled ferry service from the Illinois shore across the Mississippi to St. Louis, Missouri, was involved. In *Morgan v. Parham, supra,* it was a daily and tri-weekly steamship service between Mobile, Alabama, and New Orleans. In *Ayer & Lord Tie Company v. Kentucky, supra,* there was involved a group of boats engaged in transporting rail ties from points on the Ohio, Tennessee and Mississippi rivers to certain cities along those rivers. In *Southern Pacific Company v. Kentucky, supra,* there was a fleet of steamships making regular scheduled runs between New York and New Orleans; also between New York, New Orleans and Havana, Cuba. Whether the stops at ports of foreign

states along the route were regular scheduled or casual stops was not considered a distinguishing factor. In either case they were considered temporary, and that the ships did not become incorporated into the general mass of property; and the journey was such as to wholly exclude the idea of permanently abiding in such states. Thus they did not acquire a situs within such states; the situs remained at the domicile of the owner. However, when a ship was permanently employed in the waters of a state, not the owner's domicile, it acquired a situs for taxation there. *Old Dominion S. S. Co. v. Virginia, supra.* Petitioner asks that if the ships in this case were employed in the waters of Virginia and North Carolina "could there, under this decision, be any escape from the necessity of an apportionment between these two states?" (Petitioner's brief, p. 27.) Apparently, he has overlooked *St. Louis vs. Wiggins Ferry, supra,* in which the ferry was employed in the waters of two states—and several other cases—and there was escape from the necessity of apportionment. The boats were taxed at the owner's domicile.

To distinguish these cases, the petitioner has made an effort to establish a similarity between airplanes and railroads in support of his claim that rolling stock cases should apply. It is claimed that the fixed route of a railroad and that of petitioner may be considered the same. The fact is that the only similarity is that both have a starting and terminating point. But the route of a plane is twenty to fifty miles in width and is at an altitude of 1,000 to 15,000 feet. The plane may fly anywhere in this area, subject to certain restrictions. A plane proceeding in one direction must fly at even numbered thousands of feet, such as 2,000, 4,000, 6,000 feet, etc.; while those proceeding in the op-

posite direction fly at odd numbered thousands feet, such as 1,000, 3,000, 5,000 feet, etc.; the result is that it can be said that in all probability no two planes ever fly the identical route; and that each route really consists of fifteen routes or route levels, twenty to fifty miles in width. ("Civil Air Regulations" Part 60, 60.580-60.581; Part 61, 61.731, 61.742 U. S. Civil Aeronautics Authority). The air routes more closely resemble the ship lane of the Great Lakes and the oceans. Nor does the fact that the Civil Aeronautics authority marks out the route by radio beam add anything. We have seen that the beam acts merely as a guide. The pilot is not required to follow it. He is allowed a leaway of twenty to twenty-five miles either side of it. But is the beam any different in principle than the lighthouses, markers and buoys maintained by the Federal government for years along the seacoasts, lakes and rivers?

In *Pullman Palace Car Co. v. Penn., supra* (P. 23-24), the distinction between ships and railroad cars was recognized and what was there said concerning ships applies equally to airships:

> "Between ships * * * having their situs fixed * * * and touching land only incidentally and temporarily; and cars * * * traversing the land only, the distinction is obvious. * * * 'Maritime transportation requires no artificial roadway. * * * The navigable waters of the earth are recognized public highways of trade and intercourse'."

As the ship touches land only at a port, so the plane drops down out of the sky. A plane "requires no artificial roadway" and "is not intended to stay in port but to navigate" the air. The air-space of the world is recognized as providing public highways of trade and commerce.

That the petitioner maintains ticket offices, hangars, places for minor repairs, baggage handlers, etc., at various points along its route has no material bearing upon this controversy. All of these facilities are also maintained by ship operators, in addition to warehouses, ferry boats, tugs, barges and similar auxiliary ships. But these are mere incidents to the business of airplane or steamship owners. These things which are permanently fixed in any state are taxable there, even though the owner's domicile be elsewhere. *Old Dominion S. S. Co. v. Virginia, supra; Southern Pacific Co. v. Kentucky, supra; Hayes v. Pacific Mail S. S. Co., supra.*

When the operation of airplane and steamship service are compared, their similarity can be readily seen. Compare petitioner's field of operations in the air in the northwest with that of a steamship company upon the Great Lakes. The medium used in the one is the air. In the other, it is the water. Airships of the petitioner fly the one on regular courses on regular schedules through the territorial skies of the several states. Steamships ply the other on regular courses on regular schedules through the territorial waters of the several states. The airplane course is marked by Federally maintained beacons. The ship's course is marked by Federally maintained buoys, markers and lighthouses. Airships put down to land from time to time at airports, perhaps at Duluth, to take on and discharge passengers and freight at port facilities specially prepared for them. Steamships put into land from time to time at seaports, perhaps at Duluth, to take on and discharge passengers and freight at port facilities specially prepared for them. The petitioner's airships are continuously engaged in flying from state to state. The steam-

ships are continuously engaged in plying the water from state to state. Every reason for the adoption of the vessel rule is a reason for adopting the same rule for airplanes. To sustain the vessel rule compels the application of the same rule to airplanes. We are convinced that the court cannot sustain the contention of the petitioner without overruling the line of steamship cases.

If the doctrine of these cases were applied to petitioner's planes, it would avoid the necessity of having one rule for planes engaged in interstate commerce flying from state to state; another for planes flying on non-stop flights over intervening states in which they do not stop; and still a third for American planes engaged in foreign commerce. So far as aviation is concerned, it would require each company and the petitioner to deal with only one assessor and with one state, the state of domicile. It would avoid the complications arising from the different formulas that each state might adopt. It would avoid the difficulty of determining the number of planes that each state might tax. In short it may be truly said that it is the only rule under which we can be assured that multiple taxation may be avoided. The rule has been tried and proven for a great many years and has been found satisfactory. Insofar as the aviation industry is concerned, it would be in its best interests is such a rule were adopted.

VI.

Tax Payments Elsewhere Were Voluntary.

The petitioner claims to have paid taxes in some of the states in which it operates upon the property in question (R. 9, f. 17). It does not claim that such taxes were demanded or that the *right* to demand them has been established. Nor does it appear to what extent or on what basis taxes were paid. *It is not claimed that taxes were paid in Idaho over which it flies but in which it does not land; or in Canada.* The payment of such taxes was a voluntary act and therefore is wholly immaterial in considering the petitioner's liability for taxes. The right of the state of domicile to tax does not rest upon the fact that a tax was or was not paid elsewhere; but upon the *right* of another state to tax because a situs was there acquired. Thus, if no taxes were paid elsewhere, the problem would be unchanged. *Sancho v. Humacao Shipping Corp.*, 108 F. 2nd 157, 160. Besides, if the right to tax elsewhere had been established, it has not yet been determined that under the circumstances of this case, Minnesota would lose jurisdiction to tax. *N. Y. C. & H. R. R. Co. v. Miller, supra.*

VII.

The Tax Does Not Violate the Commerce Clause.

Involved here is a property tax on instrumentalities engaged largely in interstate and foreign commerce laid by the domiciliary state having jurisdiction. The tax is not claimed to be excessive. It is one that is laid on all prop-

erty alike and is not aimed at instrumentalities of interstate and foreign commerce. It was found by the court below (R. 30, f. 48) to be non-discriminatory. The right to lay such a tax has long been recognized. *Marye v. B. & O. R. R. Co.*, 127 U. S. 117, 124, 32 L. Ed. 94, 96; *Pullman Palace Car Company v. Pennsylvania, supra.* The petitioner is not justified in criticizing the court below for the brevity of its holding on this point, because it was not argued or stressed and further because there is not much more that can be said. The petitioner cites no authority in point. The gross income cases (*Adams Mfg. Co. v. Storen*, 304 U. S. 307 and *Gwin White and Prince, Inc. v. Henneford*, 305 U. S. 434) are not in point because they are attempts to tax activities occurring beyond the state. In *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, a tax upon a local activity was sustained. Involved in the case at bar is an ad valorem tax on property within Minnesota's jurisdiction.

There is no basis in this case to support the claim that any other state had the right to tax these planes, since the petitioner failed in sustaining this burden. *General American Tank Car Corp. v. Day*, 270 U. S. 367; 70 L. Ed. 635. Furthermore, it has not been held that jurisdiction to tax some of these planes elsewhere correspondingly reduces Minnesota's jurisdiction. *N. Y. C. & H. R. R. v. Miller, supra.* If the steamship cases are followed, this question does not arise. It has recently been held that double taxation is not constitutionally objectionable. *Illinois Central R. Co. v. Minnesota*, 309 U. S. 157; 84 L. Ed. 670.

CONCLUSION.

In conclusion we urge that the decision of the Court below be sustained (1) because it is in accord with the decisions of this Court, (2) because the petitioner has failed to sustain the burden of establishing the invalidity of the tax and (3) because it would be in the interests of the aviation industry if it had but one tax to pay and one state to deal with.

Aviation has revolutoinized communications between the states of this nation as well as the nations of the world to a much greater extent than did the railroad or the steamship. The Court judicially knows that we have established routes to many parts of the world. Distances that heretofore required weeks of travel are now reached by air in a matter of hours. "Air Transport" by J. Parker Van Zandt (Reprint of Part 2, Sec. 1 of "Transportation and National Policy" issued by National Resources Planning Board), p. 329, 333. "Post War Transport Aircraft" by Edward Warner, Vice-Chairman of Civil Aeronautics Board, p. 3, 18-20 inclusive. "American Air Transport", by Office of War Information, June, 1943, p. 11, 20. As World War I demonstrated the feasibility of commercial aviation, so this War will produce an expansion of the industry heretofore undreamed of. In determining the question here presented, all forms of domestic commercial aviation, including non-stop flights from one end of the nation to the other, as well as trans-oceanic and foreign commercial aviation should be considered. It has been shown that due to the tremendous speed of planes the vast domestic and foreign system require but a compara-

tively few planes; that it is impractical to apply to the taxation of them the rule of the rolling stock cases; that it would be well if a single rule were made applicable to all forms of commercial aviation; and it is suggested that taxation at the owner's domicile, exclusively, would be a sound and practical rule for all; especially where it is the domicile in fact as well as in law and where the principal office is located.

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